Supreme Court, U.S.
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No. 07-428

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2006

PATRICK G. ZBUKA, SR.,

Petitioner,

v.

MARATHON ASHLAND PETROLEUM, LLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER IT IS A VIOLATION OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, 29 USC 1140, A.K.A. ERISA SECTION 510 FOR AN EMPLOYER TO MISLEAD AN EMPLOYEE BY WAY OF OMISSION INTO OPTING TO RETIRE YEARS EARLY COSTING HIM FUTURE PENSION BENEFITS AS AN INCENTIVE TO HIM TO AVOID A THREATENED EMPLOYMENT TERMINATION FOR A DISCIPLINARY REASON WHEN THE GROUNDS FOR TERMINATION ARE DISPUTED AS FALSE AND OTHERWISE ACTIONABLE AS A COLLECTIVE BARGAINING AGREEMENT (CBA) GRIEVANCE AND IT IS ALSO INFERABLE THAT THE REASON FOR THE COMPANY'S OMISSION REGARDING PENSION RIGHTS IS TO AVOID CBA GRIEVANCE ARBITRATION?

LIST OF PARTIES

The party plaintiff-petitioner is Mr. Patrick G. Zbuka, Sr. of Patrick P.O. Box 106, Uniontown, Ohio 44685-0106. Mr. Zbuka is represented by Michael Terrence Conway, Esq. (Ohio bar reg. no. 0058413) principal of Michael Terrence Conway and Co., 180 Aster Place, Brunswick, Ohio 44212. (330) 220-7660. Mr. Conway was admitted to the bar of the U.S. Supreme Court on February 28, 2000.

The party defendant-respondent is Marathon Ashland Petroleum LLC, 539 South Main Street, Findlay, Ohio 45840-3295. The party respondent is represented by lead counsel Kimberly B. Schroeder, Esq. Marathon Ashland Petroleum, Suite 871-M, 539 South Main Street, Findlay, Ohio 45840. (419) 421-2598.

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The opinion of the United States Court of Appeals for the Sixth Circuit was reported in *Zbuka v. Marathon Ashland Petroleum,* Case No. 06-4314 (6th Cir. June 25, 2007). A copy of this opinion is appended at Appendix "A." A copy of the U.S. District Court opinion disposing of this case is appended at Appendix "B."

STATEMENT OF JURISDICTION

Jurisdiction for consideration of this petition is proper pursuant to 28 USC Sec. 1254 "Courts of appeals; certiorari; certified questions" which states in part "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree..." Moreover, U.S. Supreme Court Rule 13.1 states in part "a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or

a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment...." This case was disposed of in the U.S. Court of Appeals for the Sixth Circuit on June 25, 2007. The 90 day time limit for filing this appeal pursuant to Supreme Court Rule 30.1 is Monday, September 24, 2007 given the 90th day from June 25, 2007 falls on Sunday, September 23, 2007. Moreover, pursuant to Supreme Court Rule 10 (a), certiorari is properly granted when "(A) United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power..."

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case addresses a claimed violation of the Federal Employee Retirement Income and Security Act of 1974 (ERISA), 29 USC Section 1140 a.k.a. Section 510 relating to interference with employee pension plan rights. Other statutes that may be called into question is the applicability of ERISA, 29 USC Section 1132 related to breach of fiduciary duty by an employer who administers a pension plan or holds themselves out as a fiduciary. Given this case was determined and decided below on dispositive motion under the frame work of Federal Civil Rule 56 (C) that rule is also implicated.

Due to their length, all statutes and rules are appended below in Appendixes "C", "D" and "E."

STATEMENT OF THE CASE

This case addresses a violation of ERISA Section 510, 29 USC 1140 and the dismissal of the Petitioner's Sec. 510 interference claim on Respondent's motion for summary judgment. The Petitioner asserts that he was mislead into resigning from his employment position as an oil worker at the Respondents' Canton, Ohio area oil refinery in June 8, 2004 after about 25 years of employment there when after being accused of a contaminating fuel being loaded into a tanker trailer at a refinery pumping station where he allegedly and inadvertently mixed one grade of fuel with another during a tank loading process; he was told to resign his employment or be terminated by Respondent's management, after it was suggested to him by Respondent's management that if he did not resign he would forfeit a certain amount of pension benefits in a very complicated pension plan scheme involving two previously merged corporations, to wit: Ashland and Marathon, now doing business as Respondent Marathon Ashland Petroleum. The representation was communicated by way of omission when the Respondent's management did not clarify the status of the Petitioner's pension rights when the need was apparent and while it was holding itself out as having ERISA fiduciary level knowledge about such matters, and the Petitioner was weighing his options to either accept a termination and initiate a union collective bargaining agreement grievance, or waive his rights to contest the termination and retire early with a loss in pension benefits, and while in the presence of the Respondents' Human Resources managers. The Petitioner then resigned under duress and fear of losing pension benefits and later when he tried to withdraw his resignation with a clear mind before it was formally accepted by Respondent's headquarters, he was refused and told his employment was terminated. The discussion had with the Petitioner in the presence of the Respondent H.R. Managers as to whether he should resign or be terminated was in the additional context of whether or not he could pursue a grievance and contest the discipline leading to his termination. The Petitioner avers that the Respondent's using his pension benefits and his misunderstanding his pension status as a "carrot and stick" to get the Petitioner to retire and abandon his grievance rights, and to them not clarify his rights under facts where

such a clarification was required by the employer is a violation of ERISA Section 510 as it relates to interference with a pension. Under these facts it matters not whether the Petitioner would have been successful on any disciplinary grievance or whether his pension benefits loss was immediate or in the future. This Court has made it clear through its cases ERISA does not tolerate a breach of fiduciary duty to inform the Petitioner of his pension status rights by Marathon Ashland H.R. Managers who participated in misleading him into resigning. The record further shows that the Respondent did not plead the defense of federal labor relations acts or NLRB preemption in its Answer to the Complaint. In light of this, the Petitioner Patrick G. Zbuka, Sr. sued the employer Respondent Marathon Ashland Petroleum to recoup all pension losses and other damages caused by the ERISA Section 510 interference with pension plan rights violation and the case was filed on December 8, 2004 in the U.S. District Court for the Northern District of Ohio at Toledo and Hon. James G. Carr was assigned to hear the case. The Respondent Marathon Ashland Petroleum filed an Answer on January 8, 2005 denying liability. Deposition and other discovery was conducted by both parties. On February 1, 2006 the Respondent filed a motion for summary judgment. The Petitioner opposed the motion on May 1, 2006. A reply brief to the Petitioner's opposition was filed on May 23, 2006 and the motion for summary judgment was granted on August 25, 2006.

Judge Carr's opinion dismissing this case below and depriving the Petitioner of a trial on his ERISA claim advises that in his view "Zbuka was a member of the collective bargaining unit ... and could have grieved his treatment by Marathon any time" before July 1, 2004 because "they can only retire on the first of a given month." "Thus, Zbuka's decision to retire decreased, but did not eliminate entirely the period during which he could have filed a grievance." (Appendix B at 27). "That said, Zbuka's union representative...not Marathon officials, first brought up the idea of retirement in lieu of firing. There is no evidence in the record that Marathon officials coerced or tricked Zbuka into choosing retirement over being fired." *Id.* The Judge went on to opine that in the Sixth Circuit to prevail on a ERISA Section 510 claim the Petitioner must show the employer had a specific intent to deprive him of his plan benefits when he was terminated, the Petitioner had

no such evidence, and that his claim was for a loss of benefits that would accrue years into the future and thus under a temporal proximity analysis there was no evidence of Respondent's specific intent to interfere. (*Id.* at 31-32; 34-36). This was followed by the Court's denial that the Respondent's reason for terminating the Petitioner, hardly ironically on the eve of being eligible for early retirement after 25 years of service, was a pretext because Marathon Ashland "honestly" believed in its excuses for firing him even though there was no evidence of fault for the final disciplinary event used to terminate him, and fault was required to justify termination under his collective bargaining agreement rights which further was an issue which was never litigated below and again ironically, subject to the Respondent's argument that the issue would be preempted from being heard via an affirmative defense which was never plead but held against the Petitioner in summary judgment litigation never the less, to wit, Section 8 of the National Labor Relations Act, 29 USC 160. (*Id.* at 26-28). The Judge later dismissed the case finding no ERISA violation occurred and refusing to recognize the fact that NLRA preemption was waived given it was never plead as an affirmative defense. (*Id.* at 28) And at the outset, the glaring problem with Judge Carr's opinion is that the record directly contradicts it. For example, first, the deposition record shows Union rep Henry Ash testifying that when the Petitioner was told in the June 8, 2004 disciplinary meeting he was being terminated Respondent's HR manager Angie Long then advised "Patrick you have another option, you can retire." (Ash deposition at 56). Respondent's HR Manager Gretchen Plewac then answers a question by Petitioner's Union rep Henry Ash regarding "What's the difference between resigning and being terminated?" Okay. Here we have a discussion with a billion dollar oil company Human Resources department on one hand counseling an employee it wants to fire about his options, and on the other a union representative who claims to represent the Petitioner who does not know the difference between being terminated and resigning. It is almost like life imitating a Dilbert cartoon. To argue that the Petitioner was not getting independent reliable advice about his options in his termination meeting is an understatement. For the Trial Court to then claim that the Respondent did not have the intent to coerce the Petitioner into retiring in lieu of being terminated when

it discussed this option as being available and brought it up in the June 8 disciplinary meeting is absurd. The undersigned suggests that such conditions will lend themselves to the Petitioner being misinformed about his pension rights. This is buttressed by the fact the Petitioner testified in his MSJ opposition affidavit he was mislead by the Respondent's silence and Respondent's refusal to not let him consult with an attorney prior to making the resignation or termination decision. (Long depo at 42-43; Ash depo at 36; Zbuka MSJ opp. affidavit at Par. 8-10). Secondly, Respondent's HR Manager Angie Long testified that on June 8, 2004 "[Zbuka's] employment was ending that day. He did not have time to consult with anyone whether he was going to resign or be terminated." *Id.* at 43. When the Trial Court was asked to consider the Petitioner's affidavit on these issues (Zbuka MSJ opposition Affidavit at Par. 8, 9 and 10) it was dismissed as "self serving" after the fact testimony as if having no probative weight. Appendix "B" at 32. Then in Respondent's HR manager Angie Long's deposition, deposition Exhibit 8, Ms. Plewak advises "during the meeting on June 8th we [MAP] had given him [Zbuka] two options resign/retire or discharge…I told him that based upon his age and years of service, he was eligible for retirement and that was how it would be coded in the system…" Nothing was said in response to the Petitioners inquiry about what kind of retirement package the Petitioner was getting after he was left with the impression he would be forfeiting a certain amount of benefits if he was terminated. The Respondent as well as the Union ignored the Petitioner and his state of confusion about his pension rights. Indeed, Union rep Henry Ash testified: "Q. You didn't know how much Pat was getting for retirement? A. No I didn't look into it. Q. Did pat know how much he was getting for retirement? A. I don't think so. Not at that time." (Ash depo at 39-40). In light of this, Judge Carr's claim that "there is no evidence in the record that Marathon officials coerced or tricked Zbuka into choosing retirement over being fired" when the record contradicts this is reversible error. In fact, in Defendant's summary judgment motion Exhibit G, Ms. Long on page 2 advised the Plaintiff after it is noted he agreed to retire that "under MAP you are eligible for—MAP retirement at age 50 with 10 years of service. You will be eligible for Ashland's portion of the retirement benefit after you are 55 years old." In light of this, even to a casual observer it appears

the Petitioner was being told a clarification about his pension rights for the first time after the fact of a resignation decision being made and moreover after it was suggested he may be getting only one of two pensions, not the both he would be entitled to as an undisputed vested beneficiary. All of this being so, after the Petitioner resigned, the Respondent then refused to let the Petitioner withdraw his June 8, 2004 resignation before July 1, 2004 when his earlier misunderstanding about his pension became known. (Marathon HR Manager Angie Long depo at 41; 46) From Angie Long depo at 46: Q. If my client says yes, I'll retire, and he hasn't signed any documents following through, are you saying he's not allowed to change his mind? A. Employees can change their mind if they elect to retire and then don't retire. Q. ...So why wasn't my client being given that opportunity? A. Because he was being terminated." This is followed by Ms. Long admitting "If he would have elected to be terminated instead of retired, he **could have** filed a grievance." (*Id.* at 48). In fact, the Appellee insisted that Appellant "didn't have the right to rescind his resignation." (Long depo at 55). Therein lies the smoking gun. The Petitioner submits that depriving the Petitioner of his right to file a CBA grievance by way of violating ERISA fiduciary obligations amounts to an independent violation of ERISA Section 510. It cannot be disputed that one purpose of the Petitioner's discharge was to interfere with his employment benefits as evidenced by the discussion had in the termination meeting about his pension benefits. ERISA must be held to remedy this problem because it preempts all other kinds of claims that use employer pension plan manipulation as an adverse factor in say, a state law wrongful termination claim based upon a violation of public policy. It would be incongruous to argue that an employer can breach a fiduciary duty to coerce an employee to quit his job, but because there was no specific intent to interfere with a plan benefit but to terminate him for some other motive; the employee has no cause of action for the deprivation of the right to obtain additional pension benefits in the future by staying employed, for example. And with respect to who came up with the suggestion that the Petitioner choose between retirement of termination, it matters not whether it was the union or the company's idea. What matters is what information the Petitioner was given or not given about his pension status so he could make a fair and informed decision on the question

of resignation or termination. The Petitioner submits whether a terminated employee uses any alleged CBA grievance rights or not, that does not cancel out the independent violation of ERISA Section 510 as discussed above, and this remedy is available, or ought to be made available to the Petitioner in addition to any collective bargaining agreement grievance remedies for wrongful termination as the interests protected in a CBA grievance are not necessarily identical to that protected by the goals of the ERISA statutes. If Courts such as the 6th Circuit continue to subscribe to the idea that an employer does not violate ERISA Section 510 unless that deprivation of a pension benefit was the specific demonstrated purpose of the discharge in spite of the fact there was a breach of fiduciary duty, then employers will be able to use pension benefits for something they were not meant for: holding information about them hostage to escape scrutiny for wrongful termination. Indeed, neither Ms. Long or Ms, Plewac advised the Plaintiff of his eligibility under the Ashland Plan until after they secured his resignation. Accordingly, the Respondent's intent to interfere with the Petitioner's rights for a purpose that was not in the sole interest of the Petitioner or his retirement plan is readily inferable as well as the Section 510 violation.

After losing in the District Court, the Petitioner filed a timely notice of appeal to the U.S. Court of Appeals for the Sixth Circuit on September 25, 2006. The appeal was heard on oral argument and dismissed on June 25, 2007. The Sixth Circuit opinion is unremarkable and in effect endorses that of the Trial Court wholesale. (Appendix "A"). The Appellate Court held "In sum, any alleged interference with Zbuka's right to grieve his termination does not amount to an interference with his rights under the Plan and therefore fails to state a valid claim under Section 510." (Appendix "A" at page 20). The Petitioner not being satisfied with the outcome of his lower appeal and insisting he has good grounds to petition this Court now pursues the instant writ and prays that it be granted.

ARGUMENT IN FAVOR OF ISSUANCE OF THE WRIT

SUMMARY OF THE ARGUMENT

An employer can be regarded as having ERISA fiduciary duties owed to an employee when the employer's agents, such as human resources personnel for example, place themselves into a position of advising an employee about whether to retire and claim a pension or accept a termination and pursue a grievance in a disciplinary action and risk losing a pension benefit. When the employer's agents go beyond merely giving advice or not giving required information about ERISA plan rights to the employee in such a scenario, and act with an intent to use their affirmative representation or omission to accomplish another objective, such as to evade contract grievance procedures so as to ensure the employee's termination remains unchallenged and not grieved for example; ERISA Section 510 is violated in spite of collateral violations of any other independent law because it is necessary to interfere with the employee's ERISA rights to accomplish that goal, and thus an action may be brought to seek all appropriate remedies that the violation. The violation of Section 510 is proved complete upon the showing of a breach of the fiduciary duty that interferes with the employee's rights under an ERISA plan, a breach that in this case occurred on the day of the Petitioner's termination, and this Court should hold an inference of Section 510 liability can exist under such facts, reverse the lower Court who sidestepped review of this analysis on consideration of the Respondent's motion for summary judgment, and order this case remanded to trial.

DETAILED ARGUMENT

The Employee Retirement Income and Security Act of 1974 "ERISA" 29 USC 1001 *et seq.* was meant to protect employee's expectations in benefit plans. ERISA benefit plans also benefit employers by allowing them to defer compensation owed to employees and helps attract and retain desirable employees, and ERISA enforcement sections make employer promises regarding benefits credible and enforceable. An employee becomes a participant under an employee benefit plan on the date that he

becomes eligible for participation in the plan for receipt of a benefit "subject only to occurrence of the contingency for which the benefit is provided." 29 CFR 2510.3-3(d)(1)(i). In order to establish that a claimant may become eligible for benefits, he or she must show that (1) he/she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989). One of the principal purposes of ERISA is "to protect ... the interests of participants ... and ... beneficiaries ... by establishing standards of conduct, responsibility, and obligation for fiduciaries ... and ... providing for appropriate remedies ... and ready access to the Federal courts." 29 U.S.C. § 1001(b), quoted in *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996). ERISA "imposes participation, funding, and vesting requirements on pension plans and sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibilities for both pension and welfare plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). ERISA decrees that a person is a fiduciary with respect to a benefit or welfare plan and bound by ERISA fiduciary duties when he or she exercises any discretionary authority or control respecting management of a plan, or has any discretionary responsibility in administration of a plan. ERISA Section 3(21)(A); 29 USC 1002(21)(A). There is no requirement than an ERISA plan identify every person who is a fiduciary under its terms by name, and an ERISA fiduciary may be both an employer and a company benefits plan administrator who "wears two hats." ERISA Section 3 (16); *Fischer v. Philadelphia Electric Co.*, 994 F.3d 130, 133 (1993); *Varity Corporation v. Howe*, 116 S.Ct. 1065, 1071 (1996). An ERISA plan fiduciary has a duty to discharge his duties with respect to the plan solely in the interest of the participant's and beneficiaries and (A) for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims..." 29 U.S. Code Section 1104 (a). It has been held that when an ERISA plan administrator speaks, he must speak truthfully and is liable for material intentional or negligent misrepresentations about

a plan beneficiary's status. *Fischer, supra* at 135. A misrepresentation is material is there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. *Fischer, supra* at 135 *citing, Basic Inc. v. Levinson*, 485 US 224, 232-41 (1988); *see also, Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1163-64 (1988). Accordingly, it is axiomatic that an ERISA fiduciary may not mislead or lie to plan participants about their rights or employment circumstances with respect to present or future benefits under a Plan. *See, Varity Corp. v. Howe*, 516 US at 505; *Peoria Union Stock yards Co. Retirement Plan v. Penn. Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983). Moreover, "once an ERISA beneficiary has requested information from an ERISA fiduciary who is aware of the beneficiary's status and situation, the fiduciary has an obligation to convey complete and accurate information material to the beneficiaries' circumstance, even if that requires conveying information about which the beneficiary did not specifically inquire." *Krohn v. Huron Memorial Hospital*, 173 F.3d 542, 547 (6th Cir. 1999). The Sixth Circuit further holds citing *Drennan v. General Motors Corp*, 977 F.2d 246, 250 (6th Cir. 1992), *cert denied*, 508 U.S. 940 (1993) that a former employee has standing to bring suit as a "participant" under ERISA where but for an alleged misrepresentation or breach of fiduciary duty, the employee would have been in a class eligible to become a member of the plan. In light of this Section 510 of ERISA makes it unlawful for an employer to terminate an employee for the purpose of interfering with the employee's rights under an employee benefit plan: "It shall be unlawful for any person [including an ERISA fiduciary] to discharge...discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan...or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan..." (Appendix "C"). To state a *prima facie* case under ERISA Section 510, the employee must show that there was (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled. *Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996). Petitioner submits a violation of Section 510 can be accomplished by way of an

employer's breach of an ERISA fiduciary duty and remedied through the provisions of Section 1132. (Appendix "D") *Cf.*, *Mattei v. Mattei*, 126 F.3d 794, 802 (1997). Moreover, the fact that the Petitioner may be in a labor union with collective bargaining agreement grievance rights against the Respondent does not create an employer preemption defense to ERISA enforcement actions if there is a claim for an independent violation of ERISA at issue in this case, such as in this case. *Lupiani v. Wal-Mart Stores, Inc.*, 435 F.3d 842 (8th Cir. 2006). In light of these basic rules, as noted *supra*, Petitioner Zbuka has shown he retired early from his position with Respondent Marathon Ashland Petroleum after 25 years of service out of fear that he would lose certain pension benefits if he did not, and waived his rights to file a CBA grievance over the termination to protect his pension. The evidence further shows that the Respondent's HR managers counseled him in part about his options regarding retirement or termination in a pre-termination meeting and although questions were raised about his pension benefits status, the Respondent who assumed a fiduciary duty under *Varity Corp* to offer the Petitioner all information about his pension rights upon retirement said nothing to clarify the same until after it had secured a resignation under duress. The Respondent further refused the Petitioner's request for legal counsel to protect his rights no doubt because it knew it would get called on an ERISA fiduciary duty violation had a counsel for the Petitioner appeared to defend. When the Petitioner later came to realize the gravity of what had happened after the fact of his termination of employment by way of resignation and learned about the true state of his pension status, and then tried to take back the resignation in order to grieve the termination; the Respondent refused to allow it even though it had not been formally accepted by Corporate headquarters. The Respondent then admitted had the Petitioner not resigned he could have grieved the termination. We can conclude from this that Respondent Corporation used the Petitioner's ignorance and fear about his pension status against him in order to secure his uncontested resignation. A reasonable jurist could easily see this conduct was clearly taken for a "purpose of interfering with the attainment of any right to which such participant may become entitled under the plan..." as there could be no other logical explanation for it. (Appendix "C"). This Court should therefore

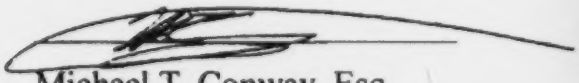
grant the writ as prayed for and accept this case to establish that ERISA does not have loopholes that allow an employer to manipulate an employee's fear and ignorance about his pension status to gain an advantage in a collateral termination dispute, and whether or not the employer is otherwise specifically motivated to terminate the employee to evade paying a pension in addition to other motives. In response to this appeal, this Court could hardly hold that ERISA Section 510 actions are so narrow in scope that an employer can violate ERISA fiduciary duties in the process of committing an independent tort or breach of contract and then walk away with out fear of liability which in error is exactly the effect of the lower Court's opinion made in response to Respondent's Fed. Civ. Rule 56 (c) motion for summary judgment which was then subject to an erroneous affirmance by the Sixth Circuit Court of Appeals. Simply put, affirming the Court below by refusing to grant the writ will send the wrong signal to all ERISA fiduciaries about how they may treat their employees in termination situations such as that presented in this case.

CONCLUSION AND PRAYER

Wherefore, in light of the foregoing, this petition for writ of certiorari should be granted for just cause shown, and this case reversed and remanded to the U.S. District Court for trial.

Respectfully Submitted,

/s/ Michael T. Conway, Esq.



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APPENDIX "A"

NOT RECOMMENDED FOR PUBLICATION

File Name: 07a0445n.06

Filed: June 25, 2007

No. 06-4314

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICK G. ZBUKA, SR.,

Plaintiff-Appellant,
v.
MARATHON ASHLAND
PETROLEUM, LLC,

Defendant-Appellee.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
OPINION

Before: GILMAN, GIBBONS, and GRIFFIN, Circuit Judges.
PER CURIAM.

Patrick G. Zbuka, Sr. had been an employee of Marathon Ashland Petroleum, LLC or its predecessor since 1979. In June of 2004, following two costly mishaps involving Zbuka, Marathon gave him the choice of either retiring or being terminated. He chose to

retire. Thereafter, Zbuka filed an action in federal district court alleging that Marathon violated § 510 of the Employee Retirement Income Security Act (ERISA) by interfering with his right to continue earning benefits under Marathon's employee pension plan. Zbuka also argued that Marathon's offer to permit him to retire instead of being terminated violated § 510 by cutting off his right under the collective bargaining agreement to grieve his termination. The district court granted Marathon's motion for summary judgment, and Zbuka timely appealed.

After carefully considering the record on appeal, the briefs of the parties, and the applicable law, and having had the benefit of oral argument, we agree with the district court's grant of summary judgment in favor of Marathon. To the extent Zbuka claims that his termination violated § 510 because it interfered with his right to continue accruing benefits under the Plan, the district court carefully and thoroughly explained why this argument fails. A detailed written opinion by us covering the same ground would therefore be unduly duplicative. The judgment rendered on that issue by the Honorable James G. Carr, Chief Judge of the United States District Court for the Northern District of Ohio, is accordingly affirmed on the basis of the reasoning set forth in his Opinion dated August 25, 2006.

Judge Carr also held that the court lacked jurisdiction over Zbuka's claim regarding his grievance rights. We decline to reach this issue because we conclude that Zbuka's complaint raised no such stand-alone claim. Instead, Zbuka alleged at most that Marathon's interference with his grievance rights violated § 510 of ERISA. The crux of this claim is that, had Zbuka successfully grieved his termination instead of being allegedly lured into retirement by Marathon, he could have continued working and accruing benefits. This argument thus boils down to nothing more than an attenuated version of Zbuka's initial claim, which the district court properly rejected. In sum, any alleged interference with Zbuka's right to grieve his termination does not amount to an interference with his rights under the Plan and therefore fails to state a valid claim under § 510.

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

APPENDIX "B"

Patrick G. Zbuka, Plaintiff, v. Marathon Ashland Petroleum, LLC, Defendant.

Case No. 3:04CV7754

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

2006 U.S. Dist. LEXIS 60406

August 25, 2006, Filed

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For Marathon Ashland Petroleum LLC, Defendant: Kimberly B. Schroeder, Lisa A. Lay, Marathon Ashland Petroleum, Findlay, OH; Patricia A. Shlonsky, Natalie M. Hostacky, Yelena Boxer, Ulmer & Berne, Cleveland, OH.

JUDGES: James G. Carr, Chief Judge.

OPINION BY: James G. Carr

OPINION: ORDER

This is a case alleging interference with an employee's pension rights. Plaintiff Patrick G. Zbuka sues his former employer, Marathon Ashland Petroleum (Marathon), for allegedly interfering with his attainment of full pension benefits in violation of § 510 of the Employee Retirement Income Security Act (ERISA) of 1974, 29

U.S.C. § 1001 *et seq.*

Jurisdiction exists under 28 U.S.C. § 1331.

Pending are Marathon's motion for summary judgment and Zbuka's motion to strike Marathon's reply memorandum. For the reasons that follow, Marathon's motion is granted and Zbuka's motion is denied.

Factual Background

Zbuka became a wastewater treatment operator in 1979 at the Canton, Ohio, refinery of Ashland Oil Company (Ashland). He became an employee of his current employer, Marathon Ashland [*2] Petroleum, when Ashland Oil formed a joint venture with the Marathon Oil Company in 1998. Zbuka's last day of employment was June 8, 2004. He contends Marathon disciplined him and ultimately forced him to retire to prevent him from obtaining a full pension.

Marathon's pension plan provides for full retirement benefits at or after age sixty-two if the employee had at least 37 1/2 years of plan participation. Zbuka would not have had 37 1/2 years of plan participation until 2017. Therefore, when Marathon fired Zbuka on June 8, 2004, he had thirteen years before he would have been eligible for full retirement benefits.

The company's plan provides for early retirement at age fifty if the employee has ten years of service. Zbuka was eligible for early retirement four years prior to his last day at work. Zbuka currently is eligible for a pension of $ 1,700 per month. n1

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n1 Zbuka began as an employee of Ashland, but Marathon ensured that such employees were not penalized and received pension benefits as if they had worked their entire career at Marathon. The details of the Ashland and Marathon plans do not affect the outcome of this case.

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Marathon states it forced Zbuka out of his job because he caused numerous workplace incidents over a three-and-half-year period that began in 2001 and ended in 2004. (Doc. 20 at 2).

Marathon fired Zbuka on June 8, 2004, after he contaminated two fuel tanks on May 24, 2004. n2 One of the contaminated fuel tanks affected ten truckloads of gasoline delivered to fourteen gas stations. Zbuka's action resulted in the closure of gas stations and thousands of dollars of damage. As a result of the incident, Marathon had to pump out more than 124,000 gallons of contaminated fuel that was delivered to the stations and reformulate it. The contamination incident occurred four days after Zbuka had tried to cover up a basin overflow by hosing bacteria-filled material down a sewer. n3

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n2 Zbuka was given the option to either retire or be fired. I use the terms, "fired," "forced resignation," and "retirement" in various parts of this opinion. In any event, regardless of the particular term, Zbuka was involuntarily removed from his job at Marathon.
n3 The statement of Steve Towell, product control manager at the Canton refinery, best summarizes the situation regarding Zbuka:
In June of 2004, I made the decision to terminate Plaintiff once [Marathon] had exhausted the progressive discipline process with Plaintiff by disciplining him for failing to check his equipment, causing two designated environmental incidents (DEIs) and two near misses, and contaminating two fuel tanks resulting in closure of gas stations and thousands of dollars in damage. I was concerned that retaining Plaintiff as an employee could jeopardize the safety of the Canton refinery, personnel, and/or community.

(Doc. 20-2, Steve Towell Dep.).

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Zbuka had a history of making such mistakes, dating back to early 2001. All of Zbuka's mishaps were documented in his personnel file. (*See* Exs. B-G). Marathon states the mistakes Zbuka made involved routine job tasks for which he was adequately trained.

Prior workplace infractions included:
On January 15, 2001, Zbuka received a written warning for failing to check his work area and equipment for two shifts;

On August 23, 2001, Zbuka allowed a tank to reach a pH as low as 4.65, which could potentially have caused the entire wastewater plant to fail. The low pH level was discovered by the operator following Zbuka's shift. Zbuka received a one-day suspension;

On March 15, 2002, Zbuka failed to discover the poor condition of water in sand filters and effluent water, which resulted in a designated environmental incident (DEI). Again, the operator following Zbuka's shift discovered the problem. Zbuka received a three-day suspension;

On December 12, 2002, Zbuka opened the block valve on a tank and drained its contents, causing a DEI. (Zbuka was supposed to have been circulating the contents of the tank). Zbuka received a five-day suspension and was informed **[*5]** -- in writing -- that another incident would result in his firing.

As a result of the foregoing incidents, Marathon supervisors had gone through the company's progressive disciplinary process when they decided to meet with Zbuka and his union representative, Henry Ash, on June 8, 2004. Supervisors told Zbuka that, based on the two most recent incidents and a history of workplace problems, they were firing him. Ash asked if Zbuka could retire instead of being fired, and the supervisors agreed to let Zbuka retire.

Zbuka left the meeting to discuss his options in a private caucus

with Ash. During that caucus, Ash told Zbuka, *inter alia,* the union was willing to help fight his (Zbuka's) termination. Zbuka, however, opted to retire, and told supervisors of his decision after the caucus.

In his lawsuit, Zbuka claims the various workplace mishaps were not his fault and contends "he is being blamed for problems caused by managerial shortcuts and a failure to train him in unorthodox procedures, and [a failure] to fix known equipment problems." (Doc. 24 at 6). Zbuka claims his supervisors knew he "was not personally at fault for any alleged violation of work rules or company procedures" **[*6]** and forced him to retire because they wanted to interfere with his ability to attain a full pension. (Compl. P 5).

Furthermore, Zbuka claims that his employer led him to believe that he would lose pension benefits if he was fired and did not elect to retire. (Pl.'s Aff. P 9). Marathon allegedly misled Zbuka "through a failure to accurately inform [him] of what [his] pension benefits would be prior to[. . .] accepting the retirement over termination option." (Pl.'s Aff. P 9). Thus, Zbuka claims Marathon human resources (HR) officials improperly breached their fiduciary duty to him (imposed on pension plan managers by ERISA n4n4) by remaining silent and not fully informing him of his pension rights. (Doc. 24 at 4).

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n4 I will assume, for the sake of this motion, that the HR officials were pension plan managers and therefore ERISA fiduciaries although Marathon notes there is reason to doubt such legal conclusion.

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Discussion

Summary judgment is appropriate "if the pleadings, depositions, answers to **[*7]** interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In viewing the evidence, I must draw all reasonable inferences in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Best v. Cyrus*, 310 F.3d 932, 934 (6th Cir. 2002); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir. 2001). Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Bell v. Marinko*, 367 F.3d 588, 591 (6th Cir. 2004) (citing *Shah v. Deaconess Hosp.*, 355 F.3d 496, 498 (6th Cir. 2004)).

1. Motion to Strike Marathon's Reply

Zbuka moves to strike Marathon's reply memorandum on the grounds that it "attempts to **[*8]** treat [Zbuka] as having moved for summary judgment in his own right and raises issues not preserved by affirmative defenses in the Answer to the Complaint." (Doc. 34 at 1). Zbuka cites no authority for his motion: his memorandum cites no case in which a district court granted a motion to strike on similar grounds. In any event, Marathon's reply memorandum does not treat Zbuka as having moved for summary judgment. Zbuka's motion to strike Marathon's reply also is groundless, as it relates to an affirmative defense Zbuka claims Marathon waived.

2. Section 8 of National Labor Relations Act [NLRA]

Zbuka repeatedly asserts that he lost the right to grieve his termination because he opted to retire, instead of being fired. In particular, Zbuka alleges Marathon forced him to retire so he would have no recourse to protect his pension rights.

Zbuka's retirement affected his ability to grieve under the CBA: only members of the collective bargaining unit can file a grievance under the CBA; retirees are not members of the unit. (Angie Long Dep. 54-55).

Zbuka was fired on June 8, 2004. Marathon employees can only retire on the first of a given month. Zbuka took unpaid absence leave **[*9]** from June 8th until July 1, 2004. Zbuka was a member of the collective bargaining unit until that date, however, and could have grieved his treatment by Marathon any time before then. (Angie Long Dep. 55). Thus, Zbuka's decision to retire decreased, but did not eliminate entirely the period during which he could have filed a grievance.

That said, Zbuka's union representative, Ash, not Marathon officials, first brought up the idea of retirement in lieu of firing. (*See* Doc. 33-3; Def.'s Ex. G). There is no evidence in the record that Marathon officials coerced or tricked Zbuka into choosing retirement over being fired. n5

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n5 Zbuka states that -- regardless of who suggested retirement -- Marathon human resources officials had a duty to inform him fully of his pension rights before he agreed to retire. That may be so, but there is still no evidence that Marathon officials cared whether Zbuka retired or was fired; they merely wanted to get rid of (what they thought was) an incompetent employee. Nothing indicates Marathon officials preferred that Zbuka retire.

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Lastly, even if Marathon forced Zbuka to resign so he could not grieve his firing, that would not give rise to a § 510 interference claim. An employer's interference with a grievance right is an unfair labor practice under § 8 of the NLRA. 29 U.S.C. § 160; 51A *Corpus Juris Secundum -- Labor Relations* § 429 (An employer commits an unfair labor practice by engaging in conduct that "interferes with, restrains, or coerces employees in the exercise of their guaranteed rights" under the NLRA, which provide the framework for employer relations with the collective bargaining unit and the establishment of

employer-union CBAs.). Unfair labor practices are within the exclusive jurisdiction of the National Labor Relations Board; this court lacks subject matter jurisdiction for such claims. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959).

Zbuka argues in his motion to strike that Marathon waived arguments that Zbuka's claim is preempted by § 8 because Marathon did not raise preemption as an affirmative defense in its answer.

Zbuka's complaint, however, did not contend Marathon interfered with his right to grieve his termination **[*11]** under the CBA. Zbuka only raised that argument in his memorandum in opposition to Marathon's motion for summary judgment. (*See* Doc. 24 at 1-2). Marathon has the right to reply to arguments raised in Zbuka's opposition. *See* Loc. R. 7.1.

Thus, Marathon may respond to Zbuka's opposition memorandum allegations that Marathon interfered with his ERISA rights by orchestrating a way to prevent him from filing a grievance under the CBA. Its response that this court does not have subject matter jurisdiction to address unfair labor practices is, moreover, correct. Allegations that Marathon interfered with Zbuka's right to file a grievance cannot support an ERISA interference claim. Zbuka's motion to strike is unwarranted on this ground as well.

In any event, Marathon's argument here does not affect the outcome. Zbuka's claim would fail even if the NLRA did not preempt claims based on alleged employer interference with grievance rights because, for the reasons that follow, Zbuka fails to establish a *prima facie* case of ERISA interference and cannot prove Marathon's proffered reason for firing him was a pretext. n6

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n6 For the analysis that follows, I assume that preemption does not apply to Zbuka's argument that Marathon forced him to retire in 2004 to prevent him from: 1) attaining full pension benefits in 2013

(Compl. P9); and 2) being able to grieve his firing under the CBA to protect his pension rights. (Pl.'s Aff. P 9).

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3. Section 510 Interference Claim

Zbuka alleges Marathon violated § 510 of ERISA, 29 U.S.C. § 1140, which provides:
[I]t is unlawful for any person to discharge, fire, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled the provisions of an employee benefit plan [. . .] or for the purpose of interfering with the attainment of any right to which such participant may become entitled to under the plan.

29 U.S.C. § 1140

Congress passed ERISA "primarily [to] prevent[] unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980); *Mattei v. Mattei*, 126 F.3d 794, 798-801 (6th Cir. 1997) (explaining legislative history of ERISA and the *West* decision).

ERISA prohibits employers from: 1) retaliating against a person who avails himself or herself of an ERISA right; and 2) interfering with the attainment of ERISA rights. *Coomer v. Bethseda Hosp.*, 370 F.3d 499, 506 (6th Cir. 2004). **[*13]**

The plaintiff must show that the employer "had the specific intent of avoiding ERISA liability when it discharged him." *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1113 (6th Cir. 2001); *Abbott v. Pipefitters Local Union No. 522*, 94 F.3d 236, 242 (6th Cir. 1996) (holding that, to establish a *prima facie* case of § 510 interference, a plaintiff "must demonstrate that the action at issue was taken with the specific intent to violate

ERISA, i.e., that a motivating factor in the defendant's action was the purpose of interfering with the plaintiff's entitlement to benefits").

This is an interference claim because Zbuka alleges Marathon fired him to prevent him from attaining ERISA rights.

Zbuka bases his § 510 claim on the fact that: 1) he was unaware of his pension rights at the time of his forced retirement; 2) he believed -- incorrectly -- he would lose pension rights if he did not agree to retire; and 3) HR officials violated their fiduciary duties to fully inform him of his pension rights before he made his decision to retire. (*See* Doc. 24 at 3-4). Zbuka also alleges that the failure to inform him of his pension rights led **[*14]** him to waive his right to challenge his termination -- and thereby protect his pension rights -- with a grievance under the CBA. (*See* Doc. 24 at 5).

Zbuka seeks to establish his *prima facie* case through indirect evidence. With cases supported by indirect evidence, courts employ a burden-shifting approach in which the plaintiff must first establish a *prima facie* case, after which the defendant has the burden of production to present legitimate reasons for its actions. *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043-44 (6th Cir. 1992); *Cupp v. Fluor Fernald, Inc.*, 2006 U.S. Dist. LEXIS 7024, 2006 WL 462446, *9 (S.D. Ohio, Feb. 26, 2006); *Soliday v. Fluor Fernald, Inc.*, 2006 U.S. Dist. LEXIS 1504, 2006 WL 143381, **7-8 (S.D. Ohio, Jan. 18, 2006). If the defendant rebuts the plaintiff's allegations, the must produce evidence sufficient to persuade the trier of fact that the defendant's proffered reason is pretextual. *Humphreys*, 966 F.2d at 1043-44.

To establish a *prima facie* case of § 510 interference, the plaintiff must show: 1) prohibited employer conduct 2) motivated by intent to interfere 3) with attainment of a pension right. *Smith v. Ameritech*, 129 F.3d 857, 865 (6th Cir. 1997). **[*15]**

I assume, *arguendo*, that Zbuka satisfies the first and third

elements of the *prima facie* case because the second element -- causation -- is lacking and therefore dispositive.

"The second element requires the presentation of a causal connection between the termination and the reduction in pension benefits." *Cupp*, 2006 U.S. Dist. LEXIS 7024, 2006 WL 462446 at *9 (citing *Pennington v. W. Atlas, Inc.*, 202 F.3d 902, 906 (6th Cir. 2000)). A plaintiff need not prove the employer's sole purpose was to violate ERISA; such a motive need only have been "a determining factor in the decision." *Id.*

Close temporal proximity helps establish causation. *Humphreys*, 966 F.3d at 1043-44; *Cupp*, 2006 U.S. Dist. LEXIS 7024, 2006 WL 462446 at *9; *Soliday*, 2006 U.S. Dist. LEXIS 1504, 2006 WL 143381 at *8. A gap of several years between the adverse employment action (such as a firing) and the attainment of ERISA rights is, without "additional highly probative facts that suggest intentional discrimination [. . .] too great to be the basis of a *prima facie* case." *Petrus v. Lucent Technologies, Inc.*, 102 F. App'x 969, 971 (6th Cir. 2004). n7

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n7 Zbuka claims that Marathon misinterprets *Petrus*. (Doc. 34 at 3-4). I disagree. The language in *Petrus* is clear: a plaintiff who seeks to show a § 510 interference claim in a situation where a significant gap exists between full pension eligibility and the adverse employment action must show "additional, highly probative facts" indicative of the employer's specific intent to violate § 510.

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In *Petrus*, 102 F. App'x at 971, the court held that an employee failed to establish a *prima facie* violation of § 510 where her employer transferred her to another division two years short of retiring with a full pension. *Id.* (stating that the court has "not

allowed plaintiffs to make out a submissible case by pointing to temporal gaps of this size").

Zbuka argues his "*prima facie* case is not based upon proof of temporal proximity between [his] eligibility for full retirement benefits and plaintiff's termination date so as to infer an intent by the employer to defeat benefits." (Doc. 24 at 11). This concession is understandable because the date on which Zbuka would have become eligible for full pension benefits was extremely remote -- thirteen years from his last day at work.

While Zbuka need not base his case on temporal proximity, he must, in the absence of such evidence, produce "additional, highly probative facts that suggest intentional discrimination" if he is to show Marathon most likely fired him with the specific intent of preventing him from attaining full pension benefits. *Petrus*, 102 F. App'x at 971.

Because the record **[*17]** lacks facts that are "highly probative" of intentional discrimination, his claim fails. The record is void of any indication Marathon fired Zbuka to stop him from attaining full pension benefits. Marathon supervisors did not force Zbuka to retire; they would have been content to fire him, and Zbuka has presented no evidence indicative of any motivation for his discharge other than his poor, and indeed, potentially dangerous, performance of his duties.

Instead of evidence, Zbuka offers only unsubstantiated, self-serving assertions that he was not at fault for the most recent workplace incidents. Even if I assume -- despite his complete lack of evidence -- Zbuka's claims are correct and he was not to blame for the numerous mishaps, that only shows Marathon should not have fired him. That does not, however, prove his supervisors terminated him with the specific intent to violate ERISA. In any event, the evidence indicates Marathon supervisors honestly believed Zbuka was a problem employee with whom they had exhausted the company's progressive discipline.

That HR officials did not inform Zbuka about the specifics of his early retirement benefits before he made his decision is not -- **[*18]** especially in light of his extensive disciplinary record -- evidence of Marathon's specific intent to interfere with his pension rights. Nothing suggests the HR officials who conducted Zbuka's exit interview specifically intended to prevent his attainment of pension rights. The HR officials who Zbuka alleges failed to inform him of his pension rights were not the same people as the supervisors who disciplined him. The HR officials had no reason to doubt that Zbuka was anything but what his personnel file portrayed him as: an incompetent employee. Zbuka produces no evidence showing HR officials conspired with supervisors to violate ERISA.

Zbuka argues that his disciplinary incidents prior to 2004 are "irrelevant to the analysis of my case." (Doc. 24-2 at 3). Not so: terminating an employee via progressive discipline is reasonable. An employer may legitimately fire an employee based on negative information in his or her personnel file. *See, e.g.*, *Reid v. Rexam Beverage Can Co.*, 434 F. Supp. 2d 500, 507 (N.D. Ohio 2006).

Thus, consideration of Zbuka's entire disciplinary history is proper in analyzing his case.

Zbuka has no independent evidence that his firing was **[*19]** anything other than what it appeared to be -- the inevitable and understandable conclusion of an employment history checkered with disciplinary warnings and suspensions.

Even if I were to consider only the two most recent disciplinary incidents, the outcome does not change. There is no evidentiary basis on which a rational trier of fact could find that it was more likely than not that Marathon fired Zbuka in 2004 with the specific intent of preventing him from attaining benefits in 2017.

Furthermore, Zbuka cannot contend that his firing prevented him from accruing a greater percentage of partial pension benefits: case law precludes that assertion. *See* *Majewski*, 274 F.3d at 1113

(holding that merely demonstrating an employee "lost the opportunity to accrue new benefits" through more years of employment does not establish a *prima facie* case); *Bingaman v. Procter & Gamble Co.*, 2005 U.S. App. LEXIS 13596, 2005 WL 1579703, *8 (6th Cir. July 6, 2005). n8

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n8 Zbuka insists he is not arguing that he only lost the opportunity to accrue new benefits. That may be so, but under Zbuka's theory of the case -- that HR officials violated their fiduciary duty to him because they did not tell him details of his early retirement benefits before he agreed to retire -- it does not appear that Marathon acted with the specific intent to violate ERISA. Zbuka would have received the same early retirement benefits regardless of whether he was fired or agreed to retire. Zbuka's supervisors did not seem to care whether he retired or was fired, so long as he immediately stopped being a Marathon employee.

Additionally, Zbuka claims the fact that the date on which he could retire was many years off goes to the damages he would receive, and not to whether he has stated a § 510 claim. That argument does not help Zbuka. Temporal proximity is one indicator of an employer's specific intent to violate ERISA. It is especially difficult to overcome the remoteness of temporal proximity if -- as is the case here -- there are no other indicators of improper employer intent.

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Specifically,

A plaintiff does not state a prima facie case of § 510 interference if the plaintiff demonstrates only that he lost the opportunity to accrue

new benefits . . . Otherwise, every employee discharged by a company with an ERISA plan would have a claim under § 510.

Majewski, 274 F.3d at 1113.

A plaintiff must present evidence showing that the employer "encouraged him to resign or accepted his resignation in order to prevent him from making a claim for employee benefits." *Abbott v. Pipefitters Local Union No. 522*, 94 F.3d 236, 242 (6th Cir. 1996); *Coomer*, 370 F.3d at 506 (stating that a § 510 interference claim requires proof that the employer acted with the intent to stop the employee from attaining an entitlement).

Both *Majewski* and *Bingaman* addressed the kind of indirect evidence needed to show such an employer had the specific intent to violate ERISA. *See, e.g., Majewski*, 274 F.3d at 1113 (plaintiff must show "not only that he lost the opportunity to accrue new benefits, but also that [the employer] had the specific intent of avoiding ERISA liability when it discharged him"); **[*21]** *Bingaman*, 2005 U.S. App. LEXIS 13596, 2005 WL 1579703 at *8 (quoting *Majewski* and determining that plaintiffs "failed to produce any evidence from which a reasonable jury could infer that [the employer] terminated their employment [. . .] to avoid having to provide [p]laintiffs with ERISA benefits").

In both cases, the Sixth Circuit held that plaintiffs who only show that their firings deprived them of the chance to "accrue new benefits" fall short of providing the kind of evidence needed to show specific intent for a § 510 interference claim. *See Majewski*, 274 F.3d at 1113; *Bingaman*, 2005 U.S. App. LEXIS 13596, 2005 WL 1579703 at *8.

A § 510 claim needs more evidence of an employer's specific intent to violate ERISA than the fact that -- had the employee not been fired -- more benefits would have accrued as a result of the passage of time. *See, e.g., Bingaman*, 2005 U.S. App. LEXIS 13596, 2005 WL 1579703 at *8.

Zbuka does not, therefore, show evidence of Marathon's specific intent to interfere with his ERISA rights under the theory that he would have been entitled to an incremental increase in partial benefits had his employment continued. *See id.* To rule otherwise would, as the **[*22]** Sixth Circuit observed in *Majewski*, 274 F.3d at 1113, drastically expand the scope of ERISA and make almost every firing at a company with an ERISA plan a § 510 violation. *Id.*

As I noted earlier, *supra,* Zbuka's other arguments -- that HR officials abused their fiduciary duty to him -- are not borne out by anything in the record.

Therefore, Zbuka fails to establish causation: he lacks evidence that Marathon's specific intent to deprive him of ERISA rights caused or in any way motivated his firing.

4. No Evidence of Pretext

Even if, however, Zbuka was able to establish a *prima facie* case, his claim would still fail because he, as has already been alluded to above, cannot prove that Marathon's proffered reason for firing him (namely, his lengthy disciplinary record) is a pretext.

Marathon has articulated a legitimate, lawful reason for terminating Zbuka: incompetence, as evidenced by his numerous mistakes (in turn documented in his personnel file). Thus, under the burden-shifting framework applied to ERISA cases, Zbuka must rebut this reason by showing it is a pretext for Marathon's specific intent to violate ERISA.

The same analytical framework **[*23]** for determining pretext in employer discrimination claims applies to ERISA interference claims. *See Pennington v. W. Atlas, Inc.*, 202 F.3d 902, 909-10 (6th Cir. 2000) *cert. denied* 531 U.S. 826, 121 S. Ct. 74, 148 L. Ed. 2d 38 (2000) (applying *Manzer v. Diamond Shamrock*, 29 F.3d 1078, 1083-84 (6th Cir.1994) and *Kline v. Tennessee Valley Auth.*, 128 F.3d 337 (6th Cir.1997) to issue of employer pretext in an ERISA interference claim).

A plaintiff can demonstrate pretext by presenting evidence that the proffered reason: 1) had no factual basis; 2) did not actually motivate the employment action; or 3) was insufficient to justify or cause the discharge. *Pennington*, 202 F.3d at 909; *Reid v. Rexam Beverage Can Co.*, 434 F. Supp. 2d 500, 506 (N.D. Ohio 2006). To rebut an employer's proffered reason as pretext, "the plaintiff may not rely simply upon his *prima facie* evidence but must, instead, introduce additional evidence." *Pennington*, 202 F.3d at 909.

Importantly, a plaintiff cannot satisfy the burden of proving employer pretext by simply questioning the employer's business judgment. *Majewski*, 274 F.3d at 1116-17; **[*24]** *Reid*, 434 F. Supp. 2d at 506. That is because "[i]f an employer honestly believes the articulated [. . .] reasons for an adverse employment action, a court will not consider those reasons pretextual merely because that reasoning is later proven incorrect." *Reid*, 434 F. Supp. at 506-07 (citing *Majewski*, 274 F.3d at 1117). Federal courts cannot second guess employers' business judgments. *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 462 (6th Cir. 2004).

The first method of showing pretext requires evidence that the alleged incidents resulting in "the plaintiff's discharge never happened." *Pennington*, 202 F.3d at 909. That is not the case here: Zbuka admits he was disciplined and that mistakes occurred, although -- for the 2004 incidents -- he attempts to shift the blame onto his supervisors for failing to monitor and train him.

Despite Zbuka's suggestion to the contrary, his entire disciplinary record is relevant to the analysis; that is the information his supervisors had before them when they decided to fire him.

Marathon documented problems with Zbuka's job performance dating back to early **[*25]** in 2001. Zbuka does not try to disprove Marathon's account of the disciplinary incidents prior to 2004. Because Zbuka only argues he is not at fault for the incidents that immediately preceded his June 8, 2004, firing, he does not fully rebut Marathon's reason for terminating him.

Furthermore, in arguing that he is not at fault for the 2004 incidents, Zbuka misses the point. The issue is not whether Marathon was correct, *i.e.,* whether Zbuka caused the incidents on which his termination was based. The issue is whether Marathon honestly believed Zbuka was at fault for those incidents. *Majewski,* 274 F.3d at 1117. If Marathon honestly believed Zbuka was at fault, Zbuka does not prove pretext merely by arguing that Marathon was incorrect because others were more to blame. I cannot, moreover, second guess Marathon's business judgment and hold that Zbuka's mistakes did not warrant firing.

Despite Zbuka's unsupported assertions that his supervisors should have better trained and supervised him, no evidence exists in the record showing that Marathon officials did not believe the proffered reason for firing him.

The second method of proving pretext is indirect and involves **[*26]** "showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the defendant" because "the sheer weight of the circumstantial evidence of discrimination makes it more likely than not that the employer's explanation is a pretext." *Pennington,* 202 F.3d at 909.

As mentioned earlier, *supra,* Zbuka attempts to make the circumstances surrounding his termination seem improper by arguing Marathon forced him to retire so he could not later challenge his firing -- and protect his pension rights -- through the grievance process. Zbuka also emphasizes he was not informed about the details of his pension benefits before he agreed to retire.

Again, those arguments are without merit. Nothing that occurred on the day of Zbuka's termination "makes it more likely than not that the employer's explanation is pretext." *Id.* By all appearances, the desire to get rid of a bad employee motivated Zbuka's supervisors; nothing indicates supervisors cared -- or even knew -- about the specifics of the pension benefits he would receive. Thus, any impact on plaintiff's pension rights could not have motivated the decision to terminate him.

Here, **[*27]** the "sheer weight of the circumstantial evidence," *Pennington,* 202 F.3d at 909, indicates Zbuka's supervisors sincerely believed they were firing a poor employee.

Lastly, the third and final means of demonstrating pretext typically is with evidence that other employees were treated more favorably while engaging in substantially identical conduct to that which allegedly motivated the adverse employment action. *Pennington,* 202 F.3d at 909.

Zbuka does not attempt to use the third method of proving pretext because he does not refer to any other employees who were similarly situated but treated more favorably.

In summary, Zbuka fails to prove Marathon's proffered reason for firing him is a pretext. As such, even if Zbuka were able to establish a *prima facie* case, his claim would still fail because he cannot rebut Marathon's legitimate, proffered reason for firing him.

Conclusion

It is therefore,

ORDERED THAT

1. Zbuka's motion to strike Marathon's reply be, and the same hereby is denied; and

2. Marathon's motion for summary judgment be, and the same hereby is granted.

So ordered.

/s/ James G. Carr

Chief Judge

APPENDIX "C"

29 USC Section 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

APPENDIX "D"

29 USC Section 1132. Civil Enforcement.

(a) Persons empowered to bring a civil action
A civil action may be brought—
(1) by a participant or beneficiary—
(A) for the relief provided for in subsection (c) of this section, or
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
(3) by a participant, beneficiary, or fiduciary
(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
(B) to obtain other appropriate equitable relief
(i) to redress such violations or
(ii) to enforce any provisions of this subchapter or the terms of the plan;
(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;
(5) except as otherwise provided in subsection (b) of this section, by the Secretary
(A) to enjoin any act or practice which violates any provision of this subchapter, or
(B) to obtain other appropriate equitable relief
(i) to redress such violation or
(ii) to enforce any provision of this subchapter;
(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) of this section or under subsection (i) or (l) of this section;
(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169 (a)(2)(A) of this title);
(8) by the Secretary, or by an employer or other person referred to in section 1021 (f)(1) of this title,
(A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or
(B) to obtain appropriate equitable relief

(i) to redress such violation or
(ii) to enforce such subsection; or
(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401 (a), 403 (a), or 405 (a) [2] of title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—
(A) requested by the Secretary of the Treasury, or
(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.
(2) The Secretary shall not initiate an action to enforce section 1145 of this title.
(3) The Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b (a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator

(A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 [2] of this title, section 1021 (e)(1) of this title, or section 1021 (f) of this title with respect to a participant or beneficiary, or

(B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021 (b)(4) [2] of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024 (a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021 (d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021 (e)(2) of this title with respect to any person or who fails to meet the requirements of section 1082 (d)(12)(E) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 a day for each violation by any person of section 1082 (b)(7)(F)(vi) of this title.
(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021 (g) of this title.
(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024 (a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.
(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with section 1021 (i) of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.
(8) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b–14 (c)(8) [2] of title 42.
(d) Status of employee benefit plan as entity
(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021 (f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975 (f)(4) of title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975 (f)(5) of title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This

subsection shall not apply to a transaction with respect to a plan described in section 4975 (e)(1) of title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518 (a) of title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.
(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056 (e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

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[1] So in original. Probably should be "subtitle".

[2] See References in Text note below.

APPENDIX "E"

Fed. Civ. Rule 56. Summary Judgment

(a) For Claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so

respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.